92-748

No. ____-____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

ALABAMA DRY DOCK AND
SHIPBUILDING CORPORATION,
an Alabama Corporation,

Petitioner,

vs.

WILLIE J. HOLCOMBE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

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QUESTIONS PRESENTED FOR REVIEW

1. Does the Longshore and Harbor Workers' Compensation Act (herein "LHWCA") prohibit an employer, which is compelled to pay benefits under the LHWCA by an Administrative Law Judge's Decision and Order Awarding Compensation in arrears and continuing current compensation as it falls due, but which paid no advance compensation, from recouping or gaining restitution of the payments previously paid where the award under which the compensation was paid was set aside by the Administrative Law Judge upon motion for reconsideration?

2. Whether a claim for recoupment or restitution of compensation benefits wrongly paid under a Longshore and Harbor Workers' Compensation Act award can be maintained under state common law causes of action?

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW..... i

RELEVANT CONSTITUTIONAL PROVISIONS AND STATUTES..... 4

STATEMENT OF THE CASE..... 4

A. Background Facts Regarding Circumstances of Payment of Compensation Under the LHWCA..... 4

B. Procedural Background..... 7

REASONS FOR GRANTING THE WRIT.....10

A. The Alabama Supreme Court's Rejection of Employer's Rights to Recoupment of compensation paid in arrears and continuing compensation as being barred by the LHWCA departs from prior federal law 10

B. The LHWCA is not a comprehensive statute which should pre-empt a separate action to recoup compensation wrongly paid.....13

C. **The instant case, unlike *Stevedoring Services of America* and *Ceres Gulf*, does not involve advance payments of compensation. Accordingly, those cases should not bar the instant action** 19

D. **Common law causes of action in state courts to recoup benefits wrongly paid under the LHWCA are not pre-empted by the LHWCA**.....21

E. **Denial of recoupment works a denial of due process of employer's right of reconsideration** 27

CONCLUSION.....28

APPENDIX A
Supreme Court of Alabama Opinion..... 1a

APPENDIX B
Circuit Court of Baldwin County, Alabama Grant of Summary Judgment for Plaintiff.....12a

APPENDIX C
Administrative Law Judge Decision and Order Awarding Compensation..15a

APPENDIX D
Administrative Law Judge Decision on Motion for Reconsideration....45a

APPENDIX E
Selected Provision of the LHWCA 33 U.S.C. §§ 901, et seq.....57a

APPENDIX F
Motion to Dismiss and Answer
filed by Respondent in Circuit
Court of Baldwin County,
Alabama.....81a

TABLE OF AUTHORITIES

CASES

Aetna Life Ins. Co. v. Harris, 578 F.2d 52, 53 (3rd Cir. 1978).....14

Alabama Dry Dock and Shipbuilding Company v. Henderson, 98 F.Supp. 1001 (S.D. Ala. 1951).....12

Allen v. Texaco, 510 F.2d 977, 979 (5th Cir. 1975).....15

Arkadelphia Milling Co. v. St. Louis S.W.R. Co., 249 U.S. 134, 39 S. Ct. 237, 63 L.Ed. 517 (1919).....17

Associate Indem. Corp. v. Shea, 325 F.Supp. 1100 (S.D. Ala. 1971), *aff'd*, 455 F.2d 913 (1972).....12

Atlantic Coast Line R.R. Co. v. Florida, 295 U.S. 301, 309 (1935)....17

Baltimore & O.R. Co. v. United States, 279 U.S. 781, 49 S.Ct. 492, 73 L.Ed. 954 (1929).....17

Ceres Gulf v. Cooper, 957 F.2d 1199, *rehearing denied without question*, (5th Cir. 1992).....9, 10,11,14,18,19,20,21,22,23

Continental Casualty Co. v. Lawson, 2 F.Supp. 459 (S.D. Fl 1932), *reversed*, 64 F.2d 802 (5th Cir. 1933).....12

Evitts v. Lucey, 476 U.S. 387, 393 (1985).....27

Federal Marine Terminals, Inc. v. Burnside Shipping Co., 394 U.S. 404 (1969).....17,22

Foshee v. General Telephone of Southeast, 322 So.2d 715, 295 Ala. 70 (1975).....23

Grumbley v. Eastern Associated Terminals, Inc.,, 9 B.R.B.S. 650 (1979).....13

Gulf Offshore Co. v. Mobile Oil Corporation, 453 U.S. 473, 101 S. Ct. 2870, 69 L.Ed.2d 784 (1981).....26

Holcombe v. Alabama Dry Dock and Shipbuilding Corporation, 602 So.2d 400 (Ala. 1992)..... 3

James v. Appel, 191 U.S. 129, 24 S.Ct. 222, 48 L.Ed. 377 (1904).....27

Kennedy v. Cochran, 475 So.2d 872 (Ala. Civ. App. 1985).....23

Merrel Dow Pharmaceuticals, Inc. v. Thompson, 478 U.S. 804, 106 S.Ct. 3229, 92 L.Ed.2d 650(1986).....26

Mid-Atlantic Nat. Bank v. New Jersey Dep't of Envir. Protection, 474 U.S. 494, 501 (1986).....17

Oliver v. Hayes International Corp., 456 So.2d 802 (Ala. Civ. App. 1984).....23

Pan American Petroleum Corporation v. Superior Court of the State of Delaware, 366 U.S. 656, 6 L.Ed.2d 584, 81 S.Ct. 1303 (1961).....25

Phillips v Marine Contract Structures, Inc., 877 F.2d 1231 (5th Cir. 1989) on rehearing, 895 F.2d 1033 (1990).....14

Provident Washington Ins. Co. v. Director, OWCP, 765 F.2d 1381, 1384 (9th Cir. 1985).....15

Quave v. Progress Marine, 912 F.2d 798, 801, *on rehearing*, 918 F.2d 33 (5th Cir. 1990), *cert. denied*, 111 Sup. Ct. 2012 (1991).....15

Rivere v. Offshore Paint and Contractors, 872 F.2d 1187, 1192 (5th Cir. 1989).....11,12

Sherrill v. Frank Morris Pontiac-Buick-GMC, Inc., 366 So.2d 251 (Ala. S. Ct. 1978).....23

Shotts v. American Income Life Ins. Co., 518 So.2d 1244 (Ala. Sup. Ct. 1987).....23

Southwest Marine, Inc. v. Gizoni, __ U.S.___, 112 Sup. Ct. 486 (1991).....15

Stevedoring Services of America, Inc. v. Eggert, 953 F.2d 552 (9th Cir. 1992) *cert. denied*, ___ U.S. ___, 112 S. Ct. 3056, (1992).....9,10,11,14,18,19,21

Strachan Shipping Co. v. Wedemeyer, 452 F.2d 1255 (5th Cir. 1991), *cert. denied*, 406 U.S. 958 (1972).....15

Todd Pacific Shipyards Corporation v. Gibson, 763 P.2d 206, 207 (Wash. Ct. App. 1988).....21

Williams v. Caterpillar Tractor Co., 482 U.S. 386, 107 C. St. 2425, 96 L.Ed. 2d 318 (1987).....24,27

CONSTITUTION, STATUTES AND RULES

U. S. Const., amend. V 4,27

28 U.S.C. § 1257.....4

28 U.S.C. § 1331 22

28 U.S.C. 2101(c)..... 4

29 U.S.C. §§ 151, et seq. 15

29 U.S.C. § 185 24,25

33 U.S.C. §§ 901, et seq. 2,4

33 U.S.C. § 905(a) 4,18

33 U.S.C. § 908(j) 4,20,21

33 U.S.C. § 914 4

33 U.S.C. § 914(a)(d)(e).....19

33 U.S.C. § 914(f) 5,13

33 U.S.C. § 914(j) 8,9,19,20

33 U.S.C. § 918 4,8,9,26

33 U.S.C. § 921 4,17

33 U.S.C. § 921(a) 7

33 U.S.C. § 921(a)-(d)..... 27

33 U.S.C. § 921(e) 8,9,27

33 U.S.C. § 922 4,20,21

33 U.S.C. § 926 4

33 U.S.C. § 927(b) 4,26

Sup. Ct. R.13.1..... 4

20 C.F.R., Part 802, § 802.206.....6

LEGISLATIVE HISTORY

LHWCA Amendments of 1981: Hearings Before the Sen. Comm. on Labor & Human Resources, 97th Cong., 1st Sess. 205 (1981.....18

OTHER

Wright, Miller, Cooper, *Federal Practice and Procedure*, West Publishing Company, 1984, § 3527, at pp. 246-257.....25

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OCTOBER TERM, 1992

ALABAMA DRY DOCK AND
SHIPBUILDING CORPORATION,
an Alabama Corporation,

Petitioner,

vs.

WILLIE J. HOLCOMBE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF ALABAMA

This petition arises out of the Supreme Court of Alabama's reversal of a grant of summary judgment by the Circuit Court of Baldwin County, Alabama ordering respondent, Willie J. Holcombe, to repay compensation he has wrongfully received under the Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. §§ 901, *et seq*. This petition is filed on behalf of Alabama Dry Dock and Shipbuilding Corporation ("ADDSCO").[1]

OPINIONS BELOW

The Administrative Law Judge's ("ALJ") unpublished "Decision and Order on Motion for Reconsideration," which

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[1] Alabama Dry Dock and Shipbuilding Corporation, an Alabama corporation, is a wholly-owned subsidiary of ADDSCO Industries, Inc., a Delaware corporation. It also has the following affiliates: Alabama Maritime Corporation and Doran-Alabama Propeller Co., Inc., both Alabama corporations.

finally determined Mr. Holcombe's right to compensation under the LHWCA, appears in Appendix D, pages 45a-56a. The ALJ's unpublished "Decision and Order Awarding Compensation" which awarded compensation in arrears and continuing compensation appears in Appendix C, pages 15a-44a. The Circuit Court of Baldwin County's unpublished "Grant of Summary Judgment," ordering Mr. Holcombe to repay the compensation which he received but to which he was not entitled, appears in Appendix B, pages 12a-14a. The Alabama Supreme Court's opinion reversing the Circuit Court of Baldwin County's decision appears in Appendix A, pages 1a-11a, and is published *Holcombe v. Alabama Dry Dock and Shipbuilding Corporation v. Holcombe*, 602 So.2d 400 (Ala. 1992).

STATEMENT OF JURISDICTION

The Alabama Supreme Court's opinion was filed July 31, 1992. No motion for

rehearing was made. Pursuant to 28 U.S.C. § 2101(c) and Sup. Ct. R. 13.1, the petition for writ of certiorari is timely filed, having been filed within 90 days of the entry of the opinion of the Supreme Court of Alabama. Jurisdiction is conferred by 28 U.S.C. § 1257.

RELEVANT CONSTITUTIONAL PROVISIONS AND STATUTES

U. S. Const., Amend V. and the following relevant provisions of the LHWCA, 33 U.S.C. §§ 901, et seq., are set forth in Appendix E, pages 57a-80a: 33 U.S.C. §§ 901, 905(a), 908(j), 914, 918, 921, 922, 926, and 927(b).

STATEMENT OF THE CASE

A. Background Facts Regarding Circumstances of Payment of Compensation Under the LHWCA.

Willie J. Holcombe filed a claim under the LHWCA alleging that he had injured his back during employment. ADDSCO controverted the claim and refused

to pay compensation prior to a formal hearing in front of a United States Department of Labor Administrative Law Judge ("ALJ"). Consistently throughout the litigation, ADDSCO contended that it had no liability to Mr. Holcombe. After a hearing before the ALJ, a Decision and Order was entered on September 11, 1990 awarding Mr. Holcombe benefits for temporary total disability and permanent total disability. The order stated in such regard as follows:

> Employer shall pay to Claimant compensation for a temporary total disability from March 29, 1982 through October 3, 1982; permanent total disability from October 5, 1982 through December 31, 1987; permanent total disability from January 1, 1983 through December 31, 1988; and permanent total disability from January 1, 1989 to date and continuing.

(Appendix C, at page 43a)

ADDSCO complied with the provisions of 33 U.S.C. § 914(f) providing that compensation must be paid within 10 days after such order. That section continues

to provide that any compensation not paid within 10 days of its due date shall be subject to a 20% penalty times the amount of unpaid compensation. Thusly, ADDSCO paid Mr. Holcombe approximately $136,116.06 of compensation in arrears and additional continuing compensation as it fell due from October 25, 1990, through January 15, 1991.

On October 25, 1990, ADDSCO timely filed a motion for reconsideration pursuant to 20 C.F.R., Part 802, § 802.206, with the ALJ seeking reconsideration of the award of compensation. On December 31, 1990, the ALJ issued his decision and order on reconsideration in which he reconsidered and reversed his previous finding of permanent total disability. His order on reconsideration limited the claimant to temporary total disability in an amount of $10,826.96 from March 29, 1982 through October 5, 1982. (Appendix D, page 55a)

On January 25, 1991, the reconsideration order became effective with its filing in the Office of the District Director in the United States Department of Labor, Jacksonville, Florida. 33 U.S.C. § 921(a).

On February 7, 1991, ADDSCO formally demanded that Mr. Holcombe repay $125,289.10, the amount of permanent disability compensation paid prior to the award of permanent disability being reconsidered and reversed.

B. PROCEDURAL BACKGROUND

On February 15, 1991, ADDSCO filed a suit against Mr. Holcombe for $125,289.10 in the Circuit Court of Baldwin County, Alabama asserting four common-law causes of action under the law of Alabama. The legal theories for recovery included first, a demand for repayment and restitution of the money paid; second, a count for money had and received; third,

a count for conversion; and fourth, a count for unjust enrichment.

On March 14, 1991, Mr. Holcombe filed a motion to dismiss the complaint for lack of jurisdiction. On April 4, 1991, Mr. Holcombe answered the complaint asserting as defenses lack of subject matter jurisdiction in the Circuit Court of Baldwin County, Alabama and failure of the complaint to state a claim upon which relief could be granted. Mr. Holcombe contended that 33 U.S.C. § 914(j), § 918, and § 921(e) governed the action, and constitute an exclusive remedy.

On April 4, 1991, ADDSCO filed its motion for summary judgment on the complaint.

On June 10, 1991, a hearing was held both on Mr. Holcombe's motion to dismiss and ADDSCO's motion for summary judgment. On June 12, 1991, Mr. Holcombe's motion to dismiss was denied. On August 20, 1991, the Circuit Court of Baldwin

County, Alabama granted ADDSCO's motion for summary judgment against Mr. Holcombe on the four causes of action set forth in the original complaint and entered final judgment thereon pursuant to Alabama law.

Mr. Holcombe filed his notice of appeal to the Supreme Court of Alabama on October 1, 1991. In his appeal, Mr. Holcombe continued to rely on 33 U.S.C. §§ 914(j), 918, and 921(e). After the briefing schedule had expired, but prior to decision, the decisions in *Ceres Gulf v. Cooper*, 957 F.2d 1199, *rehearing denied without opinion*, (5th Cir. 1992) (herein "*Ceres*") and *Stevedoring Services of America, Inc. v. Eggert*, 953 F.2d 552 (9th Cir. 1992) *cert. denied*, ___ U.S. ___, 112 S. Ct. 3056, (1992) (herein "*Stevedoring Services of America*") were entered.

Mr. Holcombe advised Supreme Court of Alabama of the decision in *Stevedoring Services of America*. ADDSCO advised the

Court of the decision in *Ceres Gulf*, and requested leave to file a supplemental response brief which was granted and filed. Thereafter, the Supreme Court of Alabama filed its opinion reversing summary judgment and directing the trial court on remand to dismiss the action for lack of subject matter jurisdiction. The opinion stated that it could not allow summary judgment to stand on state common law theories of recovery in the wake of the decisions in *Ceres Gulf* and *Stevedoring Services of America*. (Appendix A, p. 10a.)

REASONS FOR GRANTING THE WRIT

A. THE ALABAMA SUPREME COURT'S REJECTION OF EMPLOYER'S RIGHTS TO RECOUPMENT OF COMPENSATION PAID IN ARREARS AND CONTINUING COMPENSATION AS BEING BARRED BY THE LHWCA DEPARTS FROM PRIOR FEDERAL LAW.

The profoundness of the questions presented underscores their importance to scores of employers subject to the LHWCA, for unless this Court so rules, employers will be without any legal remedy to recoup compensation payments wrongfully paid. Until the decisions in *Stevedoring Services of America* and *Ceres Gulf*, the courts have assumed that Congress intended employers, which are successful in reversing a decision and order awarding compensation, to have a right to recoupment of the compensation which was not owed. *Rivere v. Offshore Paint and Contractors*, 872 F.2d 1187, 1192 (5th Cir. 1989), (herein "*Rivere*"). *See also*, footnote 2, *infra*. The courts have acknowledged only a single impediment to recoupment of compensation wrongfully paid under the LHWCA - financial inability to obtain repayment.[2] The

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[2] The Courts, in many cases, have found that though the financial condition of claimants will likely prevent employers

courts have ruled that a stay of LHWCA compensation payments will not be granted because it will not result in irreparable injury.[3] These cases have assumed that employers have a right to recoup, so payment is not irreparable. However, if the employer has no legal right to recoup compensation wrongfully paid, then, clearly payment becomes irreparable.

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from being able to recoup compensation, there is no "irreparable injury" under 33 U.S.C. § 921(b) to authorize a stay of compensation pending appeal or reconsideration. The repeated references to recoupment being practically impossible because of a claimant's financial condition, has been recognized for many years, and would have only been recognized if there was an assumption that an employer could, theoretically at least, obtain repayment from a solvent claimant. See, for example, *Associate Indem. Corp v. Shea*, 325 F.Supp. 1100 (S.D. Ala. 1971), *aff'd*, 455 F.2d 913 (1972); *Alabama Dry Dock and Shipbuilding Company v. Henderson*, 98 F.Supp. 1001 (S.D. Ala. 1951); *Continental Casualty Co. v. Lawson*, 2 F.Supp. 459 (S.D. Fl 1932), *reversed*, 64 F.2d 802 (5th Cir. 1933), cited with approval in *Rivere*, 872 F.2d at 1191. *See* also, discussion *infra* pp. 17-18.

[3] *See* note 2 *supra*. It should also be noted that on such authority ADDSCO decided not to seek a stay of payment of compensation.

The Benefits Review Board, the U. S. Department of Labor administrative appellate tribunal constituted by the LHWCA to review ALJ awards of compensation, in *Grumbley v. Eastern Associated Terminals Co.*, 9 B.R.B.S. 650 (1979), has recognized an employer's right to recoup compensation payments by separate civil action. The Board stated in *Grumbley*:

> The Act provides no procedure by which an employer can recoup payments should an award be reversed on appeal. Employer argues that the failure to provide such procedure violates the employer's right to due process. *However, this argument ignored employer's access to relief by means to a civil action for recoupment of payments if he is ultimately found not liable.* This same relief is available if employer is found liable for penalty under [33 U.S.C. § 914(f)]. [Emphasis added.]

(9 B.R.B.S. at pp. 652-53.)

B. THE LHWCA IS NOT A COMPREHENSIVE

STATUTE WHICH SHOULD PRE-EMPT A SEPARATE ACTION TO RECOUP COMPENSATION WRONGLY PAID.

The opinions in *Ceres Gulf* and the *Stevedoring Services of America* both suggest that separate civil actions are pre-empted because of the comprehensive nature of LHWCA. This proposition is simply not so. The LHWCA has a long history of implied remedies. In addition to *Rivere, supra*, the following cases all involve situations where federal courts have implied remedies under the Longshore Act: *Phillips v. Marine Contract Structures, Inc.*, 877 F.2d 1231 (5th Cir. 1989), *on rehearing*, 895 F.2d 1033 (1990) - (implying the right of an employer to recoup over-compensation paid to claimant for monies due to claimant from the Special Fund, which is the LHWCA's equivalent of a second injury trust fund); *Aetna Life Ins. Co. v. Harris*, 578 F.2d 52, 53 (3rd Cir. 1978) -

(implies that the right of an insuror to intervene in LHWCA proceedings to recoup improperly paid benefits, though the LHWCA does not expressly provide procedures for intervention); *Provident Washington Ins. Co. v. Director, OWCP*, 765 F.2d 1381, 1384 (9th Cir. 1985); *Allen v. Texaco, Inc.*, 510 F.2d 977, 979 (5th Cir. 1975); *Strachan Shipping Co. v. Wedemeyer*, 452 F.2d 1255 (5th Cir. 1991), *cert. denied*, 406 U.S. 958 (1972); *Quave v. Progress Marine*, 912 F.2d 798, 801, *on rehearing*, 918 F.2d 33 (5th Cir. 1990), *cert. denied*, 111 Sup. Ct. 2012 (1991).

This Court's recent decision in *Southwest Marine, Inc. v. Gizoni*, ___ U.S. ___, 112 Sup. Ct. 486 (1991) (herein "*Gizoni*") ruled that the LHWCA does not preclude remedies not expressly set out therein. In doing so, this Court compared the LHWCA to the National Labor Relations Act ("NLRA"), 29 U.S.C. § 151, *et seq.* and stated that the LHWCA is not

a comprehensive scheme of regulation of rights similar to the employer-employee rights regulated under NLRA, stating:

> The administrative proceedings outlined under the LHWCA in no way approach the 'NLRA's "complex and interrelated federal scheme of law, remedy, and administration" ' requiring pre-emption in those cases. *Longshoremen*, *supra*, 476 U.S. at 389, 106 Sup. Ct. at 1911 (quoting *Garmon*, *supra*, 359 U.S., at 243, 79 Sup. Ct. at 778). Neither is it 'essential to the administration' of the LHWCA that resolution of the question of coverage be left 'in the first instance' to agency proceedings in the Department of Labor.

(112 Sup. Ct. at 493.) Moreover, under NLRA, and other federal statutes, where state law claims parallel federal rights, the courts have ruled litigants may pursue state law claims.[4]

This Court has held that the provision of express remedies under LHWCA does not preclude other remedies unless

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[4] See also, discussion infra, pp. 21-27.

the LHWCA expresses a clear congressional intent to limit other remedies. *Federal Marine Terminals, Inc. v. Burnside Shipping Co.*, 394 U.S. 404 at pp. 412-13 (1969).[5]

Legislative history has recognized that the LHWCA does not pre-empt recoupment. In the 1981 congressional hearings to modify the stay provisions of 33 U.S.C. § 921, so as to grant employers the right to stay compensation payments pending an appeal, it was stated:

> Currently, there is, of course, a real problem if a claimant spends his back benefits while the case is on appeal. The employer may be unable to

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[5] There is a general rule in favor of restitution where payment pursuant to litigation is wrongfully made. *Atlantic Coast Line R.R. Co. v. Florida*, 295 U.S. 301, 309 (1935); *See also, Arkadelphia Milling Co. v. St. Louis S.W.R. Co.*, 249 U.S. 134, 39 S. Ct. 237, 63 L.Ed. 517 (1919); *Baltimore & O.R. Co. v. United States*, 279 U.S. 781, 49 S.Ct. 492, 73 L.Ed. 954 (1929). The general rule should apply in this case where there is no express congressional intent to the contrary. *Mid-Atlantic Nat. Bank v. New Jersey Dep't of Envir. Protection*, 474 U.S. 494, 501 (1986).

> recoup these benefits if the award is eventually overturned.

LHWCA Amendments of 1981: Hearings Before the Sub-Comm. on Labor of the Sen. Comm. on Labor & Human Recourses, 97th Cong., 1st Sess. 205 (1981). (Prepared statement of Chief Administrative Appeals Judge Samuel J. Smith.)

Neither the *Stevedoring Services of America* nor *Ceres Gulf* case considers 33 U.S.C. § 905(a) which provides in pertinent part:

> The liability of an employer prescribed in § 904 of this title shall be exclusive and in place of all the liability of such employer to the employee for ....

There is no counterpart provision in the LHWCA precluding employers' remedies. No sections of the LHWCA bar recoupment in this case.[6]

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[6] See discussion *infra*, pp. 19-21.

C. THE INSTANT CASE, UNLIKE STEVEDORING SERVICES OF AMERICA AND CERES GULF, DOES NOT INVOLVE ADVANCE PAYMENTS OF COMPENSATION. ACCORDINGLY, THOSE CASES SHOULD NOT BAR THE INSTANT ACTION.

The Ninth Circuit in *Stevedoring Services of America* relied on 33 U.S.C. § 914(j) because the employer had made advance payments of compensation. Similarly, in *Ceres Gulf*, the employer gratuitously made advance payment of compensation without a controversion.[7] Though *Ceres Gulf* finally controverted the claim, after a hearing, the ALJ found that no work injury had occurred and denied compensation. The ALJ denied *Ceres Gulf's* request for reimbursement of advance payments of compensation. In doing so, it relied on 33 U.S.C. § 914(j)

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[7] ADDSCO controverted Mr. Holcombe's claim under the LHWCA, and since it did, the LHWCA did not require advance payments. 33 U.S.C. § 914(a),(d), and (e).

which provides:

> If the employers made advance payments of compensation, he shall be entitled to be reimbursed out of any unpaid installment or installments of compensation due.

The Fifth Circuit in *Ceres Gulf*, expressly noted that the employer elected not to controvert the claim and made advance payments. It approved the ALJ's application of § 914(j).

The Fifth Circuit also reviewed 33 U.S.C. § 922, providing for recovery of compensation after a final award is modified but only from unpaid compensation, and 33 U.S.C. § 908(j), providing for an employer's recovery of compensation, but, only out of future compensation when an employee fails to report, omits, or understates employment related earnings. Based on its analysis of the LHWCA, the Fifth Circuit in *Ceres Gulf* concluded that the only remedy which an LHWCA employer has is to recoup compensation wrongly paid as an offset

against future compensation payments under the LHWCA.

In the instance case, ADDSCO's payment of compensation accrued in arrears and continuing compensation were neither advance payments nor subject to 33 U.S.C. § 908(j) nor 33 U.S.C. § 922.

D. COMMON LAW CAUSES OF ACTION IN STATE COURTS TO RECOUP BENEFITS WRONGLY PAID UNDER THE LHWCA ARE NOT PRE-EMPTED BY THE LHWCA.

Neither *Stevedoring Services of America* nor *Ceres Gulf* held that a state court cause of action is precluded by the LHWCA. The Ninth Circuit in *Stevedoring Services of America* expressly recognized this fact in footnote 7 where the Ninth Circuit stated as follows:

> Whether there can be a state common law claim for recovery of alleged overpayments of disability compensation under the LHWCA is an open question in Washington, the state from which *Eggert* hails (see *Todd Pacific Shipyards Corporation*

> *v. Gibson*, 763 P.2d 206, 207 (Wash. Ct. App. 1988). Although the question is not before us, it appears likely that Congress has expressed its intent to pre-empt state common law claims by employers against claimants for *repayment* of alleged overpayments of disability compensation.

(953 F.2d at 558, n. 7) Somewhat similarly, in *Ceres Gulf*, the Fifth Circuit concluded that overpayments will not support federal jurisdiction.[8]

However, ADDSCO followed a different tack. ADDSCO, as master of its complaint, rightfully chose to pursue its common law

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[8] The Fifth Circuit also rejected the concept that federal question jurisdiction exists under 28 U.S.C. § 1331. In doing so, it rejected the contention of *Ceres Gulf* that the federal courts could create a cause of action under federal common law. It did this despite the fact that the United States Supreme Court has recognized the authority to create rights of action under federal common law, though not specifically authorized by the statute. See, for example, *Federal Marine Terminals, Inc. v. Burnside Shipping Co.*, 394 U.S. 404 (1969). The Court also found that since the LHWCA was a specific statutorily defined scheme, it supplanted any general jurisdiction statute such as 28 U.S.C. § 1331.

causes of action in a state court of general jurisdiction.[9]

Wright, Miller, Cooper comment as follows:

> Whether a case is within the exclusive jurisdiction of the federal courts depends on the substantive claims the plaintiff actually asserts, not on the substantive issues that ultimately may prove decisive. Thus, for example, a suit on a contract is within the jurisdiction of the state courts even though the case will turn on regulations made under the Natural Gas Act or on questions of patent or securities law. As described by one commentator,
>
> > If a complaint directly requests the affirmative relief provided by the statute, the action is considered as "arising under" the statute and is

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[9] As to similar uses of the Alabama causes of action, see *Shott v. American Income Life Ins. Co.*, 518 So.2d 1244 (Ala. Sup. Ct. 1987); *Kennedy v. Cochran*, 475 So.2d 872 (Ala. Civ. App. 1985); *Foshee v. General Telephone of Southeast*, 322 So.2d 715, 295 Ala. 70 (1975); *Sherrill v. Frank Morris Pontiac-Buick-GMC, Inc.*, 366 So.2d 251 (Ala. S. Ct. 1978); *Oliver v. Hayes International Corp.*, 456 So.2d 802 (Ala. Civ. App. 1984).

> therefore exclusively within the jurisdiction of the federal courts. But if the federal question is introduced 'collaterally' the state courts are not deprived of jurisdiction.

Wright, Miller, Cooper, *Federal Practice and Procedure*, West Publishing Company, 1984, § 3527, at pp. 246-247.

In *Williams v. Caterpillar Tractor Co.*, 482 U.S. 386, 107 C. St. 2425, 96 L.Ed. 2d 318 (1987) (hereinafter "*Caterpillar*"), despite the applicability of § 301 of the Labor Management Relations Act, 29 U.S.C. § 185, former employees were allowed to sue their former employer for breach of individual employment contracts in state court based on state law contract rights. This Court recognized that the existence of a federal law defense will not pre-empt a state law right, stating:

> It is true that when a defense to a state claim is based on the terms of a collective-bargaining agreement, the state court will have to interpret that

> agreement to decide whether the state claim survives. But the presence of a federal question, even a § 301 question, in a defensive argument does not overcome the paramount policies embodied in the well-pleaded complaint rule--that the plaintiff is the master of the complaint, that a federal question must appear on the fact of the complaint, and that the plaintiff may, by eschewing claims based on federal law, choose to have the cause heard in state court. When a plaintiff invokes a right created by a collective-bargaining agreement, the plaintiff has chosen to plead what we have held must be regarded as a federal claim, and removal is at the defendant's option. But a defendant cannot, merely by injecting a federal question into an action that asserts what is plainly a state-law claim, transform the action into one arising under federal law, thereby selecting the forum in which the claim shall be litigated. If a defendant could do so, the plaintiff would be master of nothing. Congress has long since decided that federal defenses do not provide a basis for removal.

(107 S.Ct. at 2433.) *See also Pan American Petroleum Corporation v. Superior Court of the State of Delaware*, 366 U.S. 656, 6 L.Ed.2d 584, 81 S.Ct.

1303 (1961); *Gulf Offshore Co. v. Mobile Oil Corporation*, 453 U.S. 473, 101 S. Ct. 2870, 69 L.Ed.2d 784 (1981); *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 106 S.Ct. 3229, 92 L.Ed.2d 650 (1986).

33 U.S.C. § 927(b) grants the federal district courts with jurisdiction to punish disobedience or resistance of any lawful order of process. ADDSCO is not seeking such remedy.

ADDSCO asserts no rights created by 33 U.S.C. § 921(a)-(d). None of these sections authorizes recoupment of compensation. Also 33 U.S.C. § 921(e) provides:

> "Proceedings for suspending, setting aside, or enforcing a compensation order whether rejecting a claim or making an award shall not be instituted otherwise as provided in this section and in § 918 of this title."

ADDSCO is not attempting to suspend or set aside or enforce the compensation order. No provision in 33 U.S.C. § 918

gives the employer the right to recoup compensation payments. Even if the LHWCA did give such a right under *Caterpillar* and related authorities a state law action in state court is proper.

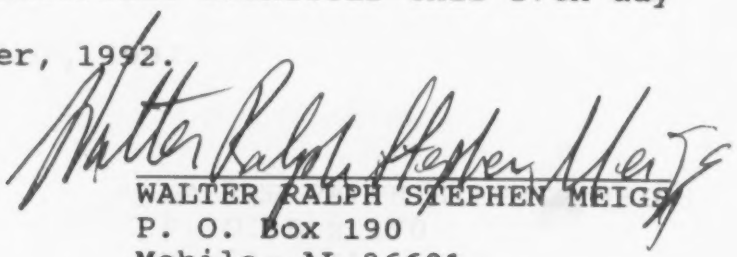
E. DENIAL OF RECOUPMENT WORKS A DENIAL OF DUE PROCESS OF EMPLOYER'S RIGHT OF RECONSIDERATION.

Denial of recoupment rights to a LHWCA employer works a denial of due process. Though this Court has held that a right to a rehearing or new trial is not a right essential to due process of law, *see*, *James v. Appel*, 191 U.S. 129, 24 S.Ct. 222, 48 L.Ed. 377 (1904), by analogy to other rights granted but not so required, if a right is granted it should be an effective right. *See*, *Evitts v. Lucey*, 476 U.S. 387, 393 (1985); U. S. Const. Amend. V.

CONCLUSION

For the foregoing reasons, petitioner respectfully prays that a writ of certiorari issue to review the opinion of the Supreme Court of Alabama.

RESPECTFULLY SUBMITTED this 27th day of October, 1992.



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APPENDIX A

SUPREME COURT OF ALABAMA

Special Term, 1992

1901992

Willie J. Holcombe

v.

Alabama Dry Dock and Shipbuilding Corporation

Appeal from Baldwin Circuit Court (CV-91-120)

ALMON, JUSTICE.

William J. Holcombe appeals from the trial court's summary judgment in favor of Alabama Dry Dock and Shipbuilding Corporation ("ADDSCO"). Under state common law theories for recovery, the trial court's summary judgment allowed ADDSCO's recovery of compensation benefits erroneously paid to Holcombe under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901, et

seq. ("LHWCA"). On this appeal, Holcombe argues that the trial court lacked subject matter jurisdiction to supplement the LHWCA with state common law theories for recovery because, he says, the LHWCA's procedures are exclusive.

The following facts are not in dispute:

During 1982, Holcombe was injured while working as an ADDSCO employee. ADDSCO is a maritime employer covered by the LHWCA. During March 1983, Holcombe made a claim for LHWCA compensation benefits. More than seven years later, in September 1990, a formal hearing of Holcombe's claim was conducted before an administrative law judge. After this hearing, the judge held in Holcombe's favor and awarded him $132,520.66 in LHWCA compensation benefits. The record does not indicate whether the

compensation order became final. The record does indicate, however, that ADDSCO paid this amount to Holcombe within 10 days of the order, presumably to avoid a penalty imposed by 33 U.S.C. § 914. ADDSCO filed a motion for reconsideration of the compensation order with the administrative law judge.[1] The administrative law judge reconsidered his original determination and entered a second compensation order. This second

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[1]This Court notes that the LHWCA established a "Benefits Review Board" ("the Board") that is "authorized to hear and determine appeals raising a substantial question of law or fact taken by any party in interest from decisions with respect to claims of employees under [the LHWCA] and the extensions thereof." 33 U.S.C. § 921(b)(3). The LHWCA gives the Board the exclusive authority to stay an employer's payment required by an LHWCA compensation order. Id. The record does not include any allegation that ADDSCO attempted to have the first compensation order stayed pending the Board's review. ADDSCO offers no explanation as to why it did not request the Board's stay of the first compensation order.

compensation order stated the administrative law judge's revised determination that Holcombe was entitled to only $10,826.96 in LHWCA compensation benefits. Later, in a letter to Holcombe's lawyer, ADDSCO demanded that Holcombe return the $121,693.70 difference between the two awards that ADDSCO had erroneously paid. Holcombe refused. ADDSCO filed an action in state court ("the trial court") against Holcombe, alleging several Alabama common law theories for recovery, including conversion and unjust enrichment.

In response to ADDSCO's claims, Holcombe moved to dismiss, arguing that the trial court did not have subject matter jurisdiction over ADDSCO's claim for the return of erroneously paid LHWCA compensation benefits. ADDSCO moved for a summary judgment, arguing that, under

the undisputed facts, Alabama's common law entitled it to a judgment against Holcombe requiring Holcombe to repay the erroneously paid LHWCA compensation benefits. After the parties' lawyers orally argued their respective motions in the trial court, the trial court denied Holcombe's motion to dismiss for lack of subject matter jurisdiction and granted ADDSCO's motion for summary judgment. This appeal is from the trial court's summary judgment in favor of ADDSCO.

On this appeal, Holcombe continues his argument that the trial court lacked subject matter jurisdiction. Holcombe argues that the LHWCA's procedures for recovering erroneously paid compensation benefits are exclusive because, he argues, Congress's enactment of the LHWCA had pre-empted the area of law governing compensation of maritime employees for

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work-related injuries. In factually similar cases, decided after the trial court's denial of Holcombe's motion to dismiss and its entry of the summary judgment for ADDSCO, two federal appellate courts have agreed with this argument, holding that the LHWCA's procedural provisions for recovering erroneously paid compensation benefits are exclusive and that no implied federal common law cause of action for recovery exists. Ceres Gulf v. Cooper, 957 F.2d 1199 (5th Cir. 1992); Stevedoring Services of America, Inc. v. Eggert, 953 F.2d 552 (9th Cir.), cert. denied, _____ U.S. ____, 112 S. Ct. 3056, ____ L.Ed.2d ___ (1992).

In Ceres Gulf, supra, an employer sought an employee's repayment of $36,000 in advance payments of LHWCA compensation benefits. As required by the LHWCA, the

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employer made these payments prior to the formal hearing. At the formal hearing, an administrative law judge determined that the alleged work injury had not occurred. The employer attempted to recover the erroneously paid compensation benefits in an action filed in a federal district court. The district court allowed the employer's recovery, and the employee appealed.

On appeal, the Ceres Gulf court reviewed the LHWCA and concluded that the LHWCA's provisions relating to an employer's recovery of erroneously paid compensation benefits were exclusive. The court observed that the LHWCA allowed for reimbursement for erroneously paid benefits in three different sections, 33 U.S.C. §§ 914(j), 922, and 908(j). All three of these sections allow the reimbursement in the form of a credit for

the employer against unpaid compensation benefits. Accordingly, the Ceres Gulf court held that the district court did not have subject matter jurisdiction, and it stated:

> "In sum, allowing this separate [federal common law cause of] action would run counter not only to the express provisions of the LHWCA -- which, alone, ends the inquiry -- but also to the underlying purpose of the Act. To allow this separate action, we would have to ignore the compromise effected by the exclusivity aspects of the LHWCA, under which the employee is barred from suing the employer, in exchange for more prompt and certain, although possibly lower, recovery. The LHWCA precludes the employee's suit, yet Ceres Gulf seeks to hale the employee into federal court because of a claimed gap in the LHWCA, concerning recovery of wrongful advance payments. The cure lies with Congress, not federal courts."

Ceres Gulf, 957 F.2d at 1209 (footnote omitted). The Ceres Gulf court relied, in part, on the decision of the Ninth Circuit Court of Appeals in Stevedoring

Services of America, supra.

In Stevedoring Services, the court reviewed the LHWCA provisions providing an employer with a remedy for erroneously paid compensation benefits, noted the "basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has specifically enacted," Stevedoring Services, 953 F.2d at 555-56 (quoting Sample v. Johnson, 771 F.2d 1335, 1345-46 (9th Cir. 1985), cert. denied, 475 U.S. 1019 (1986)), and held that no federal common law cause of action existed to allow the employer's recovery of erroneously paid LHWCA compensation benefits. In a footnote, the Stevedoring Services court stated, "Although the question is not before us, it appears likely that Congress has expressed its intent to pre-empt state common law claims by employers against

claimants for repayment of alleged overpayments of disability compensation." Id. at 558 n.7 (emphasis in original).

This Court's review of the LHWCA's provisions for an employer's remedy in the event of erroneous payment requires that we agree with the observations of the Ceres Gulf court and the Stevedoring Services court. In the wake of the federal appellate courts' refusal to rewrite or supplement the LHWCA, this Court cannot allow ADDSCO's summary judgment to stand on state common law theories of recovery. On the authority of Ceres Gulf, supra, and Stevedoring Services, supra, the trial court's summary judgment for ADDSCO is reversed. The trial court is directed, on remand, to dismiss the action for lack of subject matter jurisdiction.

REVERSED AND REMANDED.

Hornsby, C.J., and Adams, Steagall, and Ingram, JJ., concur.

APPENDIX B

IN THE CIRCUIT COURT OF BALDWIN COUNTY, ALABAMA

ALABAMA DRY DOCK AND SHIP-BUILDING CORPORATION, an Alabama corporation,	*	
Plaintiff,	*	
vs.	*	CIVIL ACTION CV-91-120
WILLIE J. HOLCOMBE,	*	
Defendant.	*	

ORDER GRANTING SUMMARY JUDGMENT FOR PLAINTIFF

Plaintiff's Motion for Summary Judgment having been filed on April 4, 1991 and oral argument having been presented on June 10, 1991 and counsel for all parties having been present in open court, and it appearing that Plaintiff is entitled to the relief requested in its motion, it is, therefore,

ORDERED, ADJUDGED and DECREED as follows:

1. That the Motion for Summary Judgment filed by Plaintiff Alabama Dry Dock and Shipbuilding Corporation is due to be GRANTED and that judgment is hereby entered in favor of Plaintiff and against Defendant Willie J. Holcombe in the amount of One Hundred Twenty-Five Thousand Two Hundred Eighty-Nine Dollars and 10/100ths ($125,289.10), together with interest from the date of this judgment and all costs of court.

2. That because this order adjudicates fewer than all of the issues presently pending before the Court, the Court hereby finds that there is no just reason for delay in the entry of judgment in favor of Plaintiff and against the Defendant Willie J. Holcombe, and the Court hereby expressly directs the entry

of final judgment as herein set forth.

DONE this 20th day of August, 1991.

JAMES H. REID
CIRCUIT JUDGE

APPENDIX C

U.S. DEPARTMENT OF LABOR

U. S. DEPARTMENT OF LABOR
Office of Administrative Law Judges
Heritage Plaza, Suite 530
111 Veterans Memorial Blvd.
Metairie, LA 70005

In the Matter of:	
WILLIE J. HOLCOMBE, Claimant,	CASE NO.: 90-LHC-96
v.	
ALABAMA DRY DOCK & SHIPBUILDING, Employer	OWCP NO. 06-74258

APPEARANCES:

MICHAEL G. HUEY, ESQ.
158 South Jackson Street
Mobile, AL 36604
for the Claimant

WALTER R. MEIGS, ESQ.
P. O. Box 190
Mobile, AL 36601
for the Employer

BEFORE: RICHARD D. MILLS
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This is a claim for compensation under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901, et. seq., (the Act) and the governing regulations thereunder, filed by Willie J. Holcombe (Claimant) against Alabama Dry Dock & Dry Dock (Employer).

The issues raised could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for resolution. Pursuant thereto, a notice of hearing was issued and a formal hearing was held on March 27, 1990 in Mobile, Alabama.[1]

STIPULATIONS

At the outset of the hearing, the parties agreed and I so find the

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[1]In this decision, joint exhibits, Claimant's exhibits, and Employer's exhibits will be denoted as "JX", "CX", and "EX", respectively.

following:

1. The date of awareness of an accident or injury was April 21, 1982;

2. Claimant and Employer were in an employee-employer relationship at or near the time of the alleged injury;

3. Claimant's average weekly wage at the time of the alleged injury was $340.56;

4. Employer filed its notice of controversion on March 10, 1983;

5. An informal conference was September 20, 1988;

6. Claimant reached maximum medical improvement on October 21, 1982;

7. Claimant has a permanent impairment of 10%; and,

8. No compensation or medical benefits have been paid by Employer.

ISSUES

The unresolved issues in this case

are fact of injury, timeliness of notice and the claim, causation, nature and extent of disability, medical benefits, interest, penalties, and attorney's fees, and availability of § 8(f) relief.

STATEMENT OF THE CASE

Claimant is a 58 year old man who cannot read nor write very well. After dropping out of school in the ninth grade, Claimant worked as a field hand on a farm, busboy, delivery driver, and bricklayer's assistant. He began working for Employer in 1974 as a general laborer and then moved to the scaffolding department.

Claimant is an inarticulate, uneducated man whose testimony was difficult to follow and understand. He was confused by dates and was unable to accurately describe what happened to him or when it happened to him. However,

Claimant did indicate that some time in 1982 he was working on the blocks under a ship, using a sledge hammer as he stooped or knelt, when he felt pain in his back. He complained to his workmate and rested for a short while, then resumed working. His companion, Reginal "Montgomery" Franklin, corroborated Claimant's testimony, although he could not remember what part of Claimant's back was hurting. Mr. Franklin left work some time thereafter also complaining of back pain. Neither Claimant nor Mr. Franklin could remember the exact date these events occurred.

Claimant testified that after Mr. Franklin had gone, he had continued working for a short period and then he told his supervisor, whose name he could not remember, that he needed to go the plant hospital because his back was bothering him. Claimant testified that

he went to the nurses' office to get aspirin for his back pain. Sarah Wynn, a nurse with Employer during this time, indicated that it was the policy of the company to record what drugs were dispensed, to whom these drugs were dispensed and the date these drugs were dispensed. Employer had no record of Claimant visiting the plant hospital in March or April 1982. However, Ms. Wynn conceded that there were times when the dispensing of certain drugs, like aspirin, were not recorded.

Claimant's employment records indicate that he last worked on March 29, 1982, after which date, he was laid off. Claimant sought treatment from his family physician, Dr. K. S. Self, on April 12, 1982, complaining of neck and right shoulder pain and numbness of his right arm. Dr. Self initially diagnosed tendinitis, but due to the lack of

improvement upon conservative treatment, Dr. Self referred Claimant to an orthopaedic surgeon, Dr. Robert Eubanks.

On April 21, 1982, Claimant was examined by Dr. Eubanks. Claimant related to Dr. Eubanks a history of pain lasting 3 weeks occurring after a day of putting up scaffolding and pulling planks from a boat. Dr. Eubanks conducted diagnostic testing which indicated a herniated disc in the cervical spine. Dr. Eubanks referred Claimant to Dr. Frank Cope, a neurosurgeon. (CX 15, 17).

Dr. Cope examined Claimant on April 22, 1982 and had a myelogram performed the same day. The myelogram indicated a laterally protruding disc at the C4-5 level on the right side. On April 26, 1982, Dr. Cope performed a partial hemilaminectomy and disc removal on Claimant. (CX 16).

Dr. Cope was unaware of Claimant's

history, but stated that Claimant's injury was a recent one. He dated the rupture in terms of weeks. He indicated that an event such as the sledge hammer activity as described by Claimant and Mr. Franklin could result in a ruptured disc.

Dr. Cope followed Claimant's recovery for several months. He felt that as of October 5, 1982, Claimant had reached maximum medical improvement and could return to work. Dr. Cope would not give restrictions on Claimant's activities nor would he comment on whether Claimant could return to his usual work with Employer because Dr. Cope did not feel he was qualified as he is not an industrial medicine or occupational medicine doctor. He also was unaware of the job requirements of a longshoreman. However, Dr. Cope indicated to Claimant that Claimant needed to decide whether he was capable

of continuing his regular employment, and if not, Claimant needed to inform his employers that he could not return. Dr. Cope did state that in most cases like Claimant's, the patient had a permanent partial disability of 10%. (CX 16).

After his surgery, Claimant continued to see Dr. Eubanks. He returned to Dr. Eubanks on May 17, 1982, at which time, he complained of stiffness in his neck and low back pain with radicular pain into his right leg. Dr. Eubanks noted that the back and leg pain had begun 5 days prior to the office visit, with an uncertain etiology. He did not relate Claimant's back pain to his work injury, indicating that it was very unusual for neck pain to be referable to the back pain as described by Claimant. (CX 17).

Dr. Eubanks treated Claimant periodically for low back pain, right

shoulder pain, and neck pain and stiffness through April 1985. He believed Claimant's cervical condition reached maximum medical improvement on October 5, 1982. He had no opinion on whether Claimant's cervical condition alone prevented Claimant from returning to his usual employment, but felt that Claimant's back condition combined with his cervical condition precluded Claimant from performing heavy labor. Dr. Eubanks recommended that Claimant avoid stress to his back and neck and limit activities such as lifting, stooping, bending, and climbing. (CX 15, 17).

While Claimant was incapacitated from the surgery, he received payments from his accident and sickness insurance policy and not under any workers' compensation program. This insurance policy also paid most of his medical expenses. Claimant testified that he

thought he had signed papers requesting benefits under the workmen's compensation scheme.

Claimant attempted to return to work, but between his physical condition and the downturn in the economy, Claimant worked very infrequently in 1983, working only 6 days for the entire year of 1983. He claimed to have worked light duty on those dates he did work. He eventually voluntarily terminated his association with Employer in March, 1984. Claimant did not work from 1984 until 1988, when he began working for the Community Action Group as a light delivery driver. The owner of this company was known to Claimant for many years and, according to Claimant, had given Claimant the job in order to help Claimant pay for his medication. He had to stop working in this position when he was diagnosed with diabetes. He was paid $3.35 an hour at

this job, making $3,240.00 in 1988.

DISCUSSION, FINDINGS OF FACT, AND CONCLUSIONS OF LAW

It is well settled that the fact finder is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiner. Hicks v. Ball Healy Granite, 12 BRBS 34 (1980); Todd Shipyards v. Donovan, 300 F.2d 741 (5th Cir. 1961). It is also recognized that all factual doubts must be resolved in favor of the claimant. Wheatly v. Adler, 407 F.2d 307 (D.C. Cir. 1968); Strachan Shipping Co. v. Shea, 406 F.2d 521 (5th Cir.), cert. denied, 395 U.S. 921 (1969). Furthermore, the Act must be liberally construed in favor of the Claimant. Voris v. Eikel, 346 U.S. 328 (1953).

The initial issue in this case is

whether Claimant gave timely notice of his injury to Employer and consequently whether Claimant filed his claim for compensation within the time limits prescribed by the Act. To determine this question, it must be determined whether Claimant in fact sustained an injury and the date such injury occurred. An injury occurs "if something unexpectedly goes wrong within the human frame." Wheatly v. Adler, 407 F.2d 307 (D.C. Cir. 1968). In this case, Claimant complained of pain to a fellow employee while working sometime in 1982. According to his employment records, Claimant last worked on March 29, 1982. Less than a month later, he was diagnosed with a ruptured cervical disc, which Dr. Cope dated as only a few weeks in age. Based on all the evidence, I find that Claimant in fact sustained an injury and because Claimant is unsure of the exact date, I

am going to designate March 29, 1982 as the date of injury.

Having determined that Claimant sustained an injury on March 29, 1982, I proceed to whether Claimant's notice and/or claim is timely. Section 12(a) requires that the employee give notice of an injury within 30 days of the date of the injury or the date when the employee was aware of the relationship between his injury and his employment. Section 13(a) requires that a claim for compensation be filed within 1 year of the same events as in § 12(a). It should be noted that Claimant is entitled to a presumption that sufficient notice of his claim was given. 33 U.S.C. § 920(b). Shaller v. Cramp Shipbuilding, Inc., 23 BRBS 140 (BRB 1989); Avondale Shipyards, Inc. v. Vinson, 623 F.2d 1117 (5th Cir. 1980). Claimant testified that he told his immediate supervisor that he needed to go

to the plant hospital for aspirin for his back and that he went to the nurses' office for aspirin. Although it is company policy to record the dispensing of drugs, even aspirin, Ms. Wynn testified that on occasion such dispensings were not recorded. Based on all the evidence, I find that Claimant did provide timely notice.

On March 2, 1983, Claimant's first attorney sent a letter to the deputy commissioner indicating that Claimant was filing a claim for compensation under the Act and that a completed LS-203 was forthcoming. (CX 1). However, no LS-203 was filed until July 22, 1986 when Claimant obtained new legal counsel. (EX 8). However, an LS-203 need not be filed in order for a claim to be considered filed. Section 13(a) provides that a claim must be in writing and filed with the deputy commissioner in the

compensation district in which the injury occurred. See 20 C.F.R. § 702.221. The claim need not be on any particular form as long as it discloses an intention to assert a right to compensation. Bingham v. General Dynamics Corp., 14 BRBS 612 (1982). In the case at hand, I find that the letter of March 2, 1983, to the deputy commissioner was more than adequate indication of Claimant's intent to claim compensation and therefore, his claim was filed via this letter on March 2, 1983. Claimant's claim for compensation is timely.

The next issue in the cause of Claimant's injury. The claimant has the burden of proving that his injury is work related. In proving causation, the claimant is aided by the § 20(a) presumption. To invoke the presumption, the claimant must establish a prima facie case of compensability; namely, he must

1) demonstrate a physical or mental impairment and 2) show the existence of some circumstances or condition at work which could have caused the impairment. U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP, 455 U.S. 608, 14 BRBS 631 (1982), rev'g 627 F.2d 455, 12 BRBS 237 (D.C. Cir. 1980). After the presumption has been invoked, the employer has the burden of rebutting the presumption with substantial evidence to the contrary. Brennen v. Bethlehem Steel Corp., 7 BRBS 947 (1978). After the presumption has been rebutted, the administrative law judge must weigh the evidence as a whole. Swinton v. J. Frank Kelly, Inc., 554 F.2d 1075 (D.C. Cir.), cert. denied, 429 U.S. 820 (1976).

I find that Claimant has established a prima facie case of compensability. Claimant sustained an injury and showed the conditions by which it could have

occurred.[2] The burden now shifts to Employer to present substantial evidence to the contrary.

As regards Claimant's cervical injury, Employer did not present sufficient evidence to rebut the presumption, therefore, I find Claimant's cervical injury to be causally related to his employment. Employer did present sufficient evidence to rebut the presumption with regard to Claimant's back condition. Dr. Eubanks, Claimant's treating orthopaedist, stated that Claimant did not complain about his low back until May 17, 1982, almost 2 months since Claimant last worked. Dr. Eubanks would not relate Claimant's low back pain to his neck injury and could not relate the back condition to any work incident. Based on the evidence as a whole, I find

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[2]See my discussion of fact of injury, supra.

that Claimant's back condition is not related to his employment.

The next issue is the nature and extent of Claimant's disability. The claimant must prove the nature and extent of his disability without the aid of the § 20(a) presumption. Holton v. Independent Stevedoring Co., 14 BRBS 441 (1981).

An employee is considered permanently disabled if he has any residual impairment after reaching maximum medical improvement. Trask v. Lockheed Shipbuilding & Construction Co., 17 BRBS 56 (1985). Dr. Cope and Dr. Eubanks stated that with regard to his cervical injury Claimant had reached MMI on October 5, 1982 and Dr. Cope thereafter rated Claimant's impairment as 10%. Therefore, I find that Claimant's condition became permanent on October 5, 1982.

The extent of a disability is defined as total or partial. To be considered totally disabled, the claimant must show that he cannot return to his usual or regular employment due to his work-related injury. Once the claimant has done this, the burden shifts to the employer to prove the existence of realistically available job opportunities which the claimant is capable of performing considering his age, education, work experience, and mental and physical limitations, and which he could secure if he diligently tried. New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031 (5th Cir. 1981). The claimant has a duty to seek employment correlative to the employer's duty to show suitable alternative employment. Roger's Terminal & Shipping Corp. v. Director, OWCP, 784 F.2d 687 (5th Cir. 1986).

It must be noted that the employment-related injury need not be the sole cause, or primary factor, in a disability for compensation purposes. Haynes v. WMATA, 7 BRBS 891 (1978).

Dr. Cope was reluctant to state whether Claimant could return to his usual employment, but did indicate that he felt Claimant should be able to return to heavy labor. Dr. Eubanks stated that Claimant's work-related cervical condition in and of itself probably would not prevent Claimant from returning to his former occupation, however, Claimant's neck problem combined with his back condition would keep Claimant from performing heavy labor. Dr. Eubanks also placed restrictions on Claimant's physical activities which would seemingly prevent Claimant from returning to his former occupation. Based on all the evidence, I find Claimant has established

a prima facie case of total disability.

The burden now shifts to Employer to show the availability of suitable alternative employment. Employer did not present any evidence of such employment. Employer failed completely in its burden to show suitable alternative employment, but because Claimant did work in 1988, Employer will have the benefit of this.

I find that Claimant is entitled to compensation for a temporary total disability from March 29, 1982 until October 5, 1982. Because Claimant worked so infrequently during 1983 due partially to his physical condition, I find that he was totally disabled during this period, and therefore entitled to permanent total disability benefits from October 5, 1982 through December 31, 1987. Because Claimant worked during the year, 1988, he is only entitled to permanent partial disability benefits from January 1, 1988

through December 31, 1988. I have chosen January 1, 1988, and December 31, 1988 as the date on which partial disability began and ended respectively because Claimant could not remember the exact dates of these events and no other records were introduced indicating the precise dates. Claimant's post-injury average weekly wage was $62.31. I arrived at this figure by dividing Claimant's income for 1988, $3,240.00 by 52.

Claimant is also entitled to permanent total disability benefits from January 1, 1989 to date and continuing because he is no longer able to work in the position he held in 1988 and because Employer has failed to show any other job which Claimant is capable of performing.

The specific dollar computations will be administratively performed by the Deputy Commissioner.

Interest shall be paid on all past due benefits outstanding in accordance with the Federal Courts Improvement Act, 28 U.S.C. § 1961. Grant v. Portland Stevedoring Co., on reconsideration, 17 BRBS 20, 22 - 23 (1985).

The next issue is Employer's liability for medical expenses and future medical benefits. Section 7 of the Act requires the employer to furnish medical treatment for any work-related injury. However, an employee cannot receive reimbursement for medical expenses unless he first requested authorization, prior to obtaining treatment, except in cases of emergency or refusal/neglect. 20 C.R.F. § 702.421; McQuillen v. Horne Brothers, Inc., 16 BRBS 10 (1983). Additionally, the § 7(d) requirement of prior request is not excused because the employee is not aware that his condition

is work-related at the time he seeks outside treatment. Mattox v. Sun Shipbuilding & Dry Dock Co., 15 BRBS 162 (1982).

Claimant presented no evidence indicating that he sought prior authorization and there can be no refusal of medical treatment without a request. Jackson v. Navy Exchange Service Center, 9 BRBS 437 (1978). Based on the evidence, or the lack thereof, I find that Claimant failed to request medical treatment from Employer and therefore, Employer is not liable for Claimant's past medical expenses. However, because Claimant's cervical condition is related to his employment, he is entitled to future necessary and reasonable medical treatment.

The next issue is Employer's liability for § 14(e) penalties. Section 14(e) of the Act provides that when any

installment of compensation is not paid within 14 days of the date it becomes due, there shall be added a 10% penalty unless the employer shall file a notice of controversion pursuant to § 14(d) with the Deputy Commissioner or the nonpayment is excused by a showing of that the payment could not be made as a result of conditions beyond its control. Section 14(b) provides that compensation shall become due on the fourteenth day after the employer has been notified pursuant to § 12 or the employer has knowledge of the injury. Employer did not file its notice of controversion until March 10, 1983 and has made no compensation payments whatsoever. Therefore, Employer is liable for § 14(e) penalties. Employer's liability for penalties ceases once the notice of controversion is filed, in this case, on March 10, 1983. Harris v. Lambert's Point Docks, Inc., 15

BRBS 33 (1982). aff'd, 718 F.2d 644 (4th Cir. 1983).

The next issue to be addressed is the availability of § 8(f) relief to Employer. Section 8(f) relief is available if three (3) requirements are met: (1) the claimant had a pre-existing permanent partial disability; (2) such pre-existing disability, in combination with the subsequent work injury, contributes to a greater degree of disability; and (3) the pre-existing disability was manifest to the employer. Director, OWCP v. Campbell Industries, Inc., 678 F.2d 836 (9th Cir. 1982), cert. denied, 459 U.S. 1104 (1983).

I find that Employer is not entitled to § 8(f) relief. Employer presented medical records which indicate Claimant has cervical degenerative disc disease and hypertension, but there was no attempt to show how either pre-existing

condition combined or contributed to make a greater degree of disability. Nor do the medical records indicate the severity of these conditions so that I cannot determine whether either of these conditions could be considered a permanent partial disability. In all, I find that Employer has failed to prove the requisite elements necessary for entitlement to § 8(f) relief.

The final issue is liability for and the amount of attorney's fees. I will consider a post-hearing attorney's fee application to be filed in accordance with the time schedule set forth in the following Order.

Based on the foregoing findings of fact, conclusions of law, and the entire record, I make the following compensation ORDER.

ORDER

It is **ORDERED** that:

1. Employer shall pay to Claimant compensation for a temporary total disability from March 29, 1982 through October 5, 1982; permanent total disability from October 5, 1982 through December 31, 1987; permanent partial disability from January 1, 1988 through December 31, 1988; and permanent total disability from January 1, 1989 to date and continuing;

2. Employer is entitled to credit for any wages Claimant earned between October 5, 1982 and March 31, 1984;

3. Employer shall pay to Claimant interest on all past due outstanding compensation in accordance with 28 U.S.C. § 1961;

4. Employer shall pay for all future necessary and reasonable medical treatment as Claimant's work-related

cervical injury may require; and,

5. Claimant's attorney shall file with the Office of Administrative Law Judges a fully supported attorney fee application within 30 days of receipt of this Order; a copy of such application must be served on opposing counsel who shall then have 20 days in which to respond thereto with objections.

RICHARD D. MILLS
Administrative Law Judge

DATED: September 11, 1990

Metairie, Louisiana
RDM:kdl

APPENDIX D

In the Matter of:	)	
WILLIE J. HOLCOMBE, Claimant,	)	CASE NO. 90-LHC-96
v.	)	
ALABAMA DRY DOCK & SHIPBUILDING, Employer.	)	OWCP NO. 06-74258

APPEARANCES:

MICHAEL J. HUEY, ESQ.
158 South Jackson Street
Mobile, Alabama 36604
for the Claimant

WALTER R. MEIGS, ESQ.
P. O. Box 190
Mobile, Alabama 36601
for the Employer

BEFORE: RICHARD D. MILLS
Administrative Law Judge

DECISION AND ORDER ON EMPLOYER'S MOTION FOR RECONSIDERATION

Employer, ADDSCO, has filed a motion for reconsideration of the decision and order issued in this case on October 15,

1990, wherein Claimant, Willie J. Holcombe, was awarded compensation benefits for a permanent total disability based on the combination of a work-related neck injury and a non-work-related back condition. Employer challenges the Court's interpretation of testimony and findings of fact. Although Employer did not specifically request reconsideration of the Court's determinations that the claim was timely and that Claimant is permanently and totally disabled, the Court must assume such are the true subjects of reconsideration based on the "more salient points of contradiction" enumerated by Employer in its Motion to Reconsider.

Employer first challenges the Court's interpretation of the testimony of Sarah Wynn's testimony. It was this

Court's impression of Ms. Wynn's testimony that she conceded that there were times when the distribution of over-the-counter medication, like aspirin, were not recorded. After reading Ms. Wynn's testimony again, the Court remains with its previous interpretation of her testimony. However, were the Court to accept Employer's interpretation of Ms. Wynn's testimony, its determination that the claim was timely would not change as this finding was also based on Claimant's testimony that he told his supervisor of his pain during his shift. Therefore, the Court denies Employer's motion to reconsider its finding with regard to the timeliness of this claim.

Employer next challenges the Court's determination of the nature and extent of Claimant's disability. Employer asserts several grounds for reconsideration of

the Court's determination that claimant is permanently and totally disabled. The Court determined that claimant was permanently and totally disabled based primarily on Dr. Eubanks' statement that the combination of Claimant's work-related cervical injury, from which Claimant reached MMI on October 5, 1982, and his subsequent nonemployment-related back condition prevented Claimant from performing heavy labor. For reasons more fully described below, the Court grants Employer's motion for reconsideration of its finding that Claimant is permanently and totally disabled.

In the case at hand, Dr. Cope, the surgeon who operated on Claimant's cervical spine, opined that Claimant had reached MMI as of October 5, 1982 from the surgery. Dr. Cope indicated that he felt that Claimant should be able to

return to work based on Claimant's recovery; however, Dr. Cope refused to give work restrictions because he is unqualified to do so. Dr. Cope also admitted ignorance of the job requirements of a longshoreman, Claimant's usual employment.

Dr. Eubanks agreed with Dr. Cope as to the date Claimant reached MMI with regard to his cervical condition. Dr. Eubanks indicated that Claimant's cervical condition alone should not prevent the Claimant from returning to work and he in fact released Claimant to return to work on October 12, 1982. Dr. Eubanks also denied that Claimant's subsequent back condition was in any way referable to his neck injury.

When a claimant sustains an injury at work which is followed by the

occurrence of a subsequent injury or aggravation outside work, the employer is liable for the entire disability and for medical expenses due to both injuries if the subsequent injury is the natural or unavoidable result of the original work injury. Hicks v. Pacific Marine & Supply Co., 14 BRBS 549 (1981). However, if the subsequent injury is not work-related or the natural progression or unavoidable result of a work-related injury, then on a claim based on a work-related injury, the aggravation rule does not apply and only the portion of disability due to the work-related injury is compensable. Bludworth Shipyard, Inc. v. Lira, 700 F.2d 1046 (5th Cir. 1983), rev'g 14 BRBS 682 (1982); Leach v. Thompson's Dairy, Inc., 13 BRBS 231 (1981).

It is obvious that this Court misapplied the aggravation rule in this

case. The Court must now determine the nature and extent of Claimant's disability without application of the aggravation rule.

Disability is defined as the "incapacity because of injury to earn the wages which the employee was receiving at the time at the time of injury in the same or any other employment." 33 U.S.C. 902(10). Disability is described in terms of nature, permanent or temporary, and its extent, total or partial. The question of extent of disability is an economic as well as a medical concept. Quick v. Martin, 397 F.2d 644 (D.C. Cir. 1968). Thus, extent of disability cannot be measured by physical or medical condition alone. Nardella v. Campbell Machine, Inc., 525 F.2d 46 (9th Cir. 1975).

An employee is considered

permanently disabled if he has any residual disability after reaching maximum medical improvement, the date of which is determined solely by medical evidence. Trask v. Lockheed Shipbuilding & Construction Co., 17 BRBS 56 (1980). Claimant reached MMI from his work-related neck injury on October 5, 1982, as testified to by both Dr. Cope and Dr. Eubanks.

The question then is whether Claimant suffers from an impairment as a result of his work injury. Dr. Cope stated that in cases like Claimant's, a patient would have a permanent partial disability rating of 10% of the whole person. Dr. Eubanks had no opinion as to Claimant's disability from his neck problems. Neither felt that Claimant's cervical condition would prevent him from returning to work.

Claimant did return to work for much longer than this Court determined its original decision. In the original decision, this Court determined that Claimant had worked only six (6) days during 1983; however, Employer's exhibit 2 shows that Claimant worked sporadically for a total of approximately two (2) months during that year. Employment records indicated that Claimant was temporarily laid off many times until he voluntarily terminated his employment with Employer.

As Claimant's work-related injury did not prevent his return to his usual employment, the Court must find that Claimant fully recovered from his cervical injury with no residual disability. Therefore, Claimant's disability from his work injury was only temporary in nature, lasting from the

date of the injury, March 29, 1982, until the date of MMI, October 5, 1982. During that period of time, Claimant was totally disabled as Dr. Eubanks did not release Claimant for work until October 12, 1982. Claimant is only entitled to compensation for a temporary total disability from March 29, 1982 until October 5, 1982.

In reading over the original Decision and Order, it has come to the attention of this Court that it failed to include in the Order a provision ordering Employer to pay § 14(e) penalties. Employer was found liable for such penalties in the body of the Decision and the Court is taking this opportunity to correct this oversight on its part.

Employer's motion for reconsideration as to the nature and extent of Claimant's disability is granted and the original Order is amended

to read as follows:

ORDER

It is ORDERED that:

1. Employer shall pay to Claimant compensation for a temporary total disability from March 29, 1982 through October 5, 1982, pursuant to § 8(b) of the Act;

2. Employer shall pay to Claimant interest on all past due outstanding compensation in accordance with 28 U.S.C. § 1961;

3. Employer shall pay penalties in accordance with § 14(e) of the Act;

4. Employer shall pay for continuing medical expenses associated with Claimant's work-related cervical injury; and

5. Claimant's attorney shall file with the Office of Administrative Law Judges a fully supported attorney fee

application within 30 days of receipt of this Order; a copy of such application must be served on opposing counsel who shall then have 20 days in which to respond thereto with objections.

RICHARD D. MILLS
Administrative Law Judge

DATE: December 31, 1990

Metairie, Louisiana
RDM:kdl

APPENDIX E

U. S. Const., Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

§ 901. Short title

This chapter may be cited as "Longshore and Harbor Workers' Compensation Act."

§ 905(a). Exclusiveness of liability

(a) Employer liability; failure of employer to secure payment of compensation

The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by

this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee. For purposes of this subsection, a contractor shall be deemed the employer of a subcontractor's employees only if the subcontractor fails to secure the payment of compensation as required by section 904 of this title.

§ 908. Compensation for disability

(j)(1) The employer may inform a

disabled employee of his obligation to report to the employer not less than semi-annually any earnings from employment or self-employment, on such forms as the Secretary shall specify in regulations.

(j)(2) An employee who --

(A) Fails to report the employee's earnings under paragraph (1) when requested, or

(B) knowingly and willfully omits or understates any part of such earnings,

and who is determined by the deputy commissioner to have violated clause (A) or (B) of this paragraph, forfeits his right to compensation with respect to any period during which the employee was required to file such report.

(j)(3) Compensation forfeited under this subsection, if already paid, shall

be recovered by a deduction from the compensation payable to the employee in any amount and on such schedule as determined by the deputy commissioner.

§ 914. Payment of compensation

(a) Manner of Payment

Compensation under this chapter shall be paid periodically, promptly, and directly to the person entitled thereto, without an award, except where liability to pay compensation is controverted by the employer.

(d) Right to compensation controverted

If the employer controverts the right to compensation he shall file with the deputy commissioner on or before the fourteenth day after he has knowledge of the alleged injury or death, a notice, in accordance with a form prescribed by the Secretary, stating that the right to

compensation is controverted, the name of the claimant, the name of the employer, the date of the alleged injury or death, and the grounds upon which the right to compensation is controverted.

(e) Additional compensation for overdue installment payments payable without award

If any installment of compensation payable without an award is not paid within fourteen days after it becomes due, as provided in subdivision (b) of this section, there shall be added to such unpaid installment an amount equal to 10 per centum thereof, which shall be paid at the same time as, but in addition to, such installment, unless notice is filed under subdivision (d) of this section, or unless such nonpayment is excused by the deputy commissioner after a showing by the employer that owing to conditions over which he had no control

such installment could not be paid within the period prescribed for the payment.

(f) Additional compensation for overdue installment payments payable under terms of award

If any compensation, payable under the terms of an award is not paid within ten days after it becomes due, there shall be added to such unpaid compensation an amount equal to 20 per centum thereof, which shall be paid at the same time as, but in addition to, such compensation, unless review of the compensation order making such award is had as provided in section 921 of this title and an order staying payment has been issued by the Board or court.

(j) Reimbursement for advance payments

If the employer has made advance payments of compensation, he shall be entitled to be reimbursed out of any

unpaid installment or installments of compensation due.

§ 918. Collection of defaulted payments; special fund

(a) In case of default by the employer in the payment of compensation due under any award of compensation for a period of thirty days after the compensation is due and payable, the person to whom such compensation is payable may, within one year after such default, make application to the deputy commissioner making the compensation order or[1] a supplementary order declaring the amount of the default. After investigation, notice, and hearing, as provided in section 919 of this title, the deputy commissioner shall make a supplementary order, declaring the amount

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[1] So in original. Probably should read "for".

of the default, which shall be filed in the same manner as the compensation order. In case the payment in default is an installment of the award, the deputy commissioner may, in his discretion, declare the whole of the award as the amount in default. The applicant may file a certified copy of such supplementary order with the clerk of the Federal district court for the judicial district in which the employer has his principal place of business or maintains an office, or for the judicial district in which the injury occurred. In case such principal place of business or office or place where the injury occurred is in the District of Columbia, a copy of such supplementary order may be filed with the clerk of the United States District Court for the District of Columbia. Such supplementary order of the deputy commissioner shall be final,

and the court shall upon the filing of the copy enter judgment for the amount declared in default by the supplementary order if such supplementary order is in accordance with law. Review of the judgment so entered may be had as in civil suits for damages at common law. Final proceedings to execute the judgment may be had by writ of execution in the form used by the court in suits at common law in actions of assumpsit. No fee shall be required for filing the supplementary order nor for entry of judgment thereon, and the applicant shall not be liable for costs in a proceeding for review of the judgment unless the Court shall otherwise direct. The Court shall modify such judgment to conform to any later compensation order upon presentation of a certified copy thereof to the court.

(b) In cases where judgment cannot be satisfied by reason of the employer's

insolvency or other circumstances precluding payment, the Secretary of Labor may, in his discretion and to the extent he shall determine advisable after consideration of current commitments payable from the special fund established in section 944 of this title, make payment from such fund upon any award made under this chapter, and in addition, provide any necessary medical, surgical, and other treatment required by section 907 of this title in any case of disability where there has been a default in furnishing medical treatment by reason of the insolvency of the employer. Such an employer shall be liable for payment into such fund of the amounts paid therefrom by the Secretary of Labor under this subsection; and for the purpose of enforcing this liability, the Secretary of Labor for the benefit of the fund shall be subrogated to all the rights of

the person receiving such payment or benefits as against the employer and may by a proceeding in the name of the Secretary of Labor under this section or under subsection (c) of section 921 of this title, or both, seek to recover the amount of the default or so much thereof as in the judgment of the Secretary is possible, or the Secretary may settle and compromise any such claim.

§ 921. Review of compensation orders

(a) Effectiveness and finality of orders

A compensation order shall become effective when filed in the office of the deputy commissioner as provided in section 919 of this title, and, unless proceedings for the suspension or setting aside of such order are instituted as

provided in subdivision (b) of this section, shall become final at the expiration of the thirtieth day thereafter.

(b) Benefits Review Board; establishment; members; chairman; quorum; voting; questions reviewable; record; conclusiveness of findings; stay of payments; remand

(1) There is hereby established a Benefits Review Board which shall be composed of five members appointed by the Secretary from among individuals who are especially qualified to serve on such Board. The Secretary shall designate one of the members of the Board to serve as chairman. The Chairman shall have the authority, as delegated by the Secretary, to exercise all administrative functions necessary to operate the Board.

(2) For the purpose of carrying out its functions under this chapter, three members of the Board shall constitute a quorum and official action can be taken only on the affirmative vote of at least three members.

(3) The Board shall be authorized to hear and determine appeals raising a substantial question of law or fact taken by any party in interest from decisions with respect to claims of employees under this chapter and the extensions thereof. The Board's orders shall be based upon the hearing record. The findings of fact in the decision under review by the Board shall be conclusive if supported by substantial evidence in the record considered as a whole. The payment of the amounts required by an award shall not be stayed pending final decision in any such

proceeding unless ordered by the Board. No stay shall be issued unless irreparable injury would otherwise ensue to the employer or carrier.

(4) The Board may, on its own motion or at the request of the Secretary, remand a case to the administrative law judge for further appropriate action. The consent of the parties in interest shall not be a prerequisite to a remand by the Board.

(5) Notwithstanding paragraphs (1) through (4), upon application of the Chairman of the Board, the Secretary may designate up to four Department of Labor administrative law judges to serve on the Board temporarily, for not more than one year. The Board is authorized to delegate to panels of three members any or all of the powers which the Board may exercise. Each such panel shall have no

more than one temporary member. Two members shall constitute a quorum of a panel. Official adjudicative action may be taken only on the affirmative vote of at least two members of a panel. Any party aggrieved by a decision of a panel of the Board may, within thirty days after the date of entry of the decision, petition the entire permanent Board for view of the panel's decision. Upon affirmative vote of the majority of the permanent members of the Board, the petition shall be granted. The Board shall amend its Rules of Practice to conform with this paragraph. Temporary members, while serving as members of the Board, shall be compensated at the same rate of compensation as regular members.

(c) Court of appeals; jurisdiction; persons entitled to review; petition; record; determination and enforcement;

service of process; stay of payments

Any person adversely affected or aggrieved by a final order of the Board may obtain a review of that order in the United States Court of appeals for the circuit in which the injury occurred, by filing in such court within sixty days following the issuance of such Board order a written petition praying that the order be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court, to the Board, and to the other parties, and thereupon the Board shall file in the court the record in the proceedings as provided in section 2112 of Title 28. Upon such filing, the court shall have jurisdiction of the proceeding and shall have the power to give a decree affirming, modifying, or setting aside, in whole or in part, the order of the Board and enforcing same to the extent

that such order is affirmed or modified. The orders, writs, and processes of the court in such proceedings may run, be served, and be returnable anywhere in the Untied States. The payment of the amounts required by an award shall not be stayed pending final decision in any such proceeding unless ordered by the court. No stay shall be issued unless irreparable injury would otherwise ensue to the employer or carrier. The order of the court allowing any stay shall contain a specific finding, based upon evidence submitted to the court and identified by reference thereto, that irreparable damage would result to the employer, and specifying the nature of the damage.

(d) District court; jurisdiction; enforcement of orders; application of beneficiaries of awards or deputy commissioner; process for compliance with orders

If any employer or his officers or agents fails to comply with a compensation order making an award, that has become final, any beneficiary of such award or the deputy commissioner making the order, may apply for the enforcement of the order to the Federal district court for the judicial district in which the injury occurred (or to the United States District Court for the District of Columbia if the injury occurred in the District). If the court determines that the order was made and served in accordance with law, and that such employer or his officers or agents have failed to comply therewith, the court shall enforce obedience to the order by writ of injunction or by other proper process, mandatory or otherwise, to enjoin upon such person and his officers and agents compliance with the order.

(e) Institution of proceedings or

suspension, setting aside, or enforcement of compensation orders

Proceedings for suspending, setting aside, or enforcing a compensation order, whether rejecting a claim or making an award, shall not be instituted otherwise than as provided in this section and section 918 of this title.

§ 922. Modification of awards

Upon his own initiative, or upon the application of any party in interest (including an employer or carrier which has been granted relief under section 908(f) of this title), on the ground of a change in conditions or because of a mistake in a determination of fact by the deputy commissioner, the deputy commissioner may, at any time prior to one year after the date of the last payment of compensation, whether or not a

compensation order has been issued, or at any time prior to one year after the rejection of a claim, review a compensation case (including a case under which payments are made pursuant to section 944(i) of this title) in accordance with the procedure prescribed in respect of claims in section 919 of this title, and in accordance with such section issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation. Such new order shall not affect any compensation previously paid, except that an award increasing the compensation rate may be made effective from the date of the injury, and if any part of the compensation due or to become due is unpaid, an award decreasing the compensation rate may be made effective

from the date of the injury, and any payment made prior thereto in excess of such decreased rate shall be deducted from any unpaid compensation, in such manner and by such method as may be determined by the deputy commissioner with the approval of the Secretary. This section does not authorize the modification of settlements.

§ 926. Costs in proceedings brought without reasonable grounds

If the court having jurisdiction of proceedings in respect of any claim or compensation order determines that the proceedings in respect of such claim or order have been instituted or continued without reasonable ground, the costs of such proceedings shall be assessed against the party who has so instituted or continued such proceedings.

§ 927(b). Powers of deputy commissioners or Board

(b) If any person in proceedings before a deputy commissioner or Board disobeys or resists any lawful order or process, or misbehaves during a hearing or so near the place thereof as to obstruct the same, or neglects to produce, after having been ordered to do so, any pertinent book, paper, or document, or refuses to appear after having been subpoenaed, or upon appearing refuses to take the oath as a witness, or after having taken the oath refuses to be examined according to law, the deputy commissioner or Board shall certify the facts to the district court having jurisdiction in the place in which he is sitting (or to the United States District Court for the District of Columbia if he is sitting in such District) which shall

thereupon in a summary manner hear the evidence as to the acts complained of, and, if the evidence so warrants, punish such person in the same manner and to the same extent as for a contempt committed before the court, or commit such person upon the same conditions as if the doing of the forbidden act had occurred with reference to the process of or in the presence of the court.

APPENDIX F

IN THE CIRCUIT COURT OF BALDWIN COUNTY, ALABAMA

ALABAMA DRY DOCK AND SHIPBUILDING CORPORATION, an Alabama corporation,	)	
Plaintiff,	)	CIVIL ACTION NO. CV-91-120
WILLIE J. HOLCOMBE,	)	
Defendant.	)	

MOTION TO DISMISS

Comes now the Defendant, through undersigned counsel, and moves this Court to dismiss the complaint in the above-styled cause for lack of jurisdiction, and as grounds therefore shows as follows:

1. The Plaintiff has brought this lawsuit in an attempt to recover the overpayment of benefits from it to the Defendant in connection with a claim by the Defendant under the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. Section 901 et. seq. In its

complaint, the Plaintiff alleges that benefits for permanent total disability and temporary total disability were awarded to the Defendant by the Honorable Richard D. Mills, Administrative Law Judge. Plaintiff further alleges that it paid $136,116.06 to the Defendant pursuant to this order from October 25, 1990 through January 15, 1991. Plaintiff further alleges that on or about December 31, 1991, the Administrative Law Judge issued an order on the Plaintiff's Motion for Reconsideration, changing the original order of compensation so that Plaintiff was only liable to the Defendant for temporary total disability benefits. Plaintiff's suit here seeks to recover the overpayment of benefits it made to the Defendant both prior to and subsequent to the ALJ's Order on Reconsideration.

2. Section 21 of the LHWCA (33 USC

Section 921) provides that review and enforcement of compensation orders shall be accomplished by filing the appropriate petition in the appropriate U. S. Court of Appeals or United States District Court. Section 21 further provides at subsection (e): "Proceedings for suspending, setting aside, or enforcing a compensation order, whether rejecting a claim or make an award, shall not be instituted other than as provided in this section and section 918 of this title." Section 918 deals with the failure of an employer to pay an award, and is not applicable to this action. Section 914(j) of the title provides for reimbursement for advance payments of compensation made to any employee by an employer. The provisions of the LHWCA provide the exclusive remedy for situations such as the one in this case, and this Court is without jurisdiction to

issue any orders or rulings on this case, as it seeks to enforce an order of an Administrative Law Judge issued in connection with a LHWCA claim, and should properly be brought in the federal courts.

WHEREFORE, Defendant moves this Court to dismiss the complaint in the above styled cause for lack of jurisdiction.

DEFENDANT REQUESTS ORAL ARGUMENT OF THIS MOTION.

Respectfully Submitted,

GLENN L. DAVIDSON
Attorney for Defendant
Post Office Box 6251
Mobile, Alabama 36660
(205) 476-2015

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing pleading on counsel for all parties by mailing the same by first class mail, postage prepaid, on March 13, 1992:

Daniel G. Blackburn, Esq.
Post Office Box 409
Bay Minette, Alabama 36507

Walter R. Meigs, Esq.
Post Office Box 190
Mobile, Alabama 36633

GLENN L. DAVIDSON

APPENDIX F

IN THE CIRCUIT COURT OF BALDWIN COUNTY, ALABAMA

ALABAMA DRY DOCK AND SHIPBUILDING CORPORATION, an Alabama corporation,	)	
Plaintiff,	)	CIVIL ACTION NO. CV-91-120
WILLIE J. HOLCOMBE,	)	
Defendant.	)	

ANSWER

Comes now the Defendant, through undersigned counsel, and for answer to the Plaintiff's complaint states the following:

1. Paragraph 1 is admitted.

2. Paragraph 2 is admitted.

3. Paragraph 3 is admitted, except the Defendant is without knowledge or information sufficient to form an opinion of the truth of the alleged figure for the total dollar amount of liability of the Plaintiff under the Longshore Act.

4. Defendant is without knowledge

or information sufficient to form an opinion as to the truth of the matters set forth in paragraph 4.

5. Defendant is without knowledge or information sufficient to form an opinion as to the truth of the matters set forth in paragraph 5.

6. Paragraph 6 is denied.

7. Paragraph 7 contains reallegations of paragraphs 1 through 6. Defendant realleges the answers to paragraphs 1 through 6 as set forth above.

8. Paragraph 8 is denied.

9. Paragraph 9 contains reallegations of paragraphs 1 through 6. Defendant realleges the answers to paragraphs 1 through 6 as set forth above.

10. Paragraph 10 is denied.

11. Paragraph 11 contains reallegations of paragraphs 1 through 6.

Defendant realleges the answers to paragraphs 1 through 6 as set forth above.

12. Paragraph 12 is denied.

FIRST DEFENSE

The complaint, and each and every cause of action set forth therein, fails to state a claim upon which relief can be granted.

SECOND DEFENSE

The Circuit Court of Baldwin County lacks jurisdiction over the subject matter of the complaint.

Respectfully Submitted,

GLENN L. DAVIDSON, Esq.
Attorney for Defendant
Post Office Box 6251
Mobile, Alabama 36660
(205) 476-2015